



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MACHAKOS**

**CRIMINAL APPEAL NO. 126 OF 2015**

**PETER GICHAMBA KIRATU .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(An Appeal arising out of the sentence of Hon P. Wambugu SRM in Traffic [Case No. 293 of 2014](#) delivered on 19<sup>th</sup> August 2015 in the Senior Resident Magistrate's Court at Kilungu)**

**JUDGMENT**

The Appellant was charged with the offence of driving a motor vehicle under the influence of alcohol contrary to section 85 of the Traffic Act. The particulars were that on the 18<sup>th</sup> July 2015 at about 1300 hours along Nairobi Mombasa highway at Emali Pipeline area, Nzau District, in Makueni County, the Appellant being the driver of motor vehicle registration number KCB 893G/ZE 9216 make Actros did drive the said vehicle while drunk on the said road.

The Appellant was arraigned in the trial court on 19<sup>th</sup> August 2015 when he pleaded guilty to the charges. The court convicted the Appellant on his plea of guilty and sentenced him to serve one year in jail and cancelled his licence for life. The Appellant is aggrieved by the judgment of the trial magistrate and has preferred this appeal against the conviction and sentence. The main grounds of appeal as stated in the Appellant's Petition of Appeal dated 2<sup>nd</sup> September 2015 were that the trial magistrate erred in law by meting out a sentence that is unknown in law; by failing to avail the Appellant the option to pay a fine; by failing to consider whether the Appellant had the optimal capacity to plead to the charge; and by meting out an excessive sentence.

The Appellant's learned counsel, Kibungei & Company Advocates, filed written submissions in Court dated 12<sup>th</sup> March 2016. It was argued therein on the issue of the plea of guilty that the trial magistrate should have had doubts over the competence of the Appellant to take a plea due to his intoxication, since the Appellant stated that he was drunk in court.

Secondly, it was submitted that the plea was not unequivocal as the facts to the charge were not given by the prosecution. The Appellant in this regard relied on the decisions in **Adan vs Republic, (1973) EA 446**, and in **M'kuyuKaindio vs Republic, (2014) eKLR**. Thirdly it was argued that the prosecution did not produce any exhibit in court to corroborate the fact that the Appellant had alcoholic substance in his system. Reliance was placed on the holding in **Rashid Oyoo vs Republic, (2012) eKLR**.

It was further submitted on the sentence that the Appellant was charged under section 85 of the Traffic Act which did not donate to the trial court the power to disqualify an accused person convicted under the provision from holding or obtaining a driving licence. It was also submitted that the sentence was

excessive and harsh and the appellate court had the authority to interfere. In that regard the Appellant cited the decisions in **Donald Mukaka Mukatala vs R, (2013) eKLR** and **James Ngaruiya Kariuki vs R, (2015) eKLR**. Lastly, it was submitted that orders for retrial would cause injustice to the Appellant since documentary evidence was not availed by the prosecution at trial. In that regard reliance was placed on the cases of **Peter Muiruri and James Kamau vs R, (2014) eKLR** and **Judy Nkirote vs R, (2013) eKLR**

Mrs Tabitha Saoli, the learned Prosecution counsel, filed submissions dated 20<sup>th</sup> June 2016 wherein she conceded the appeal based on the sentence, and stated that although the sentence of one year imprisonment is proper, the cancellation of the driving licence was not provided for under section 85 of the Traffic Act.

As this is a first appeal, I am required to conduct a fresh evaluation of all the evidence and come to an independent conclusion as to whether or not to uphold the conviction and sentence. This task must have regard to the fact that I never saw or heard the witnesses testify (see **Okeno v Republic [1973] EA 32**).

I have considered the arguments by the Appellant and Prosecution, and find that the issues for determination by the court are firstly, whether the plea of guilty by the Appellant was unequivocal; secondly, whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Penal Code or in any other statute; and lastly, whether the said sentence is amenable to reduction and /or variation.

The procedure to be applied in taking a plea of guilty were well enunciated in the case of **Adan vs Republic, [1973] EA 445** where the Court held as follows:-

***“(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.***

***(ii) The accused’s own words should be recorded and if they are an admission, a plea of guilty should be recorded.***

***(iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts.***

***(iv) If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.***

***(v) If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused’s reply should be recorded.”***

The procedure as laid out in **Adan vs Republic** (supra) is also provided for under section 207 of the Criminal Procedure Code which provides as follows:

**(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.**

**(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:**

**Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.**

**(3) If the accused person does not admit the truth of the charge, the court shall proceed to**

**hear the case as hereinafter provided.**

**(4) If the accused person refuses to plead, the court shall order a plea of “not guilty” to be entered for him.**

Coming to the present appeal, I will first address the argument by the Appellant that the taking of the Appellant’s plea while he was intoxicated was in error. The record of the trial Court shows that after the charge was explained to the Appellant he replied and the proceedings continued as follows:

**“Guilty**

**Prosecutor:**

**Facts as per the charge sheet.**

**Accused:**

**Facts are correct. I had taken alcohol at Mtito Andei. I am still drunk”**

The provisions on taking of plea are predicated on an assumption that the accused person understands the charge that is being read and explained to him or her, so that he or she is able to make an informed decision as to whether to plead guilty or not guilty. In the event that there are circumstances that may interfere with the ability of an accused person to understand the nature of the charge, including drunkenness, it is prudent that the relevant judicial officer defers the taking of plea to such time as the accused is in a fit mental state to respond to the charge. To this extent I agree with the Appellant that the plea taking by the trial Court was not proper once he indicated that he was still drunk.

I also agree with the Appellant that there are no facts read to the Court or on record to show that that the elements of the charge were met, and therefore no offence was disclosed to which a conviction and sentence could be based. These findings essentially dispose of this appeal. It is however also important for this Court to state that it is indeed the position as conceded by the Prosecution that the sentence was also illegal, to the extent that the penalty of cancellation of a driving licence is not provided for the offence of driving a motor vehicle under the influence of alcohol under section 85 of the Traffic Act.

Arising from the foregoing reasons, I accordingly quash the conviction of the Appellant for the charge of driving a motor vehicle under the influence of alcohol contrary to section 85 of the Traffic Act. I also set aside the sentence imposed upon the Appellant for this conviction, and order that the sureties for the Appellant be and are hereby discharged.

Orders accordingly.

**DATED AT MACHAKOS THIS 19<sup>th</sup> DAY OF JULY 2016.**

**P. NYAMWEYA**

**JUDGE**